

IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 22 OF 2020

IN THE MATTER of an Appeal from the Judgment of the Magistrate's Court of Suva dated 23 December 2019 and Sentence dated 3 March 2020 in Criminal Case No. CF 2098 of 2016.

BETWEEN : ROHIT RAM LATCHAN

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr. Vinit Singh with Mr. E. Kumar for the Appellant
 Ms. Moira Konrote for the Respondent

Date of Hearing : 13 October 2020

Judgment : 12 February 2021

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Suva.

- [2] As per the Amended Charge filed in the Magistrate's Court of Suva the Appellant was charged with the following offences:

FIRST COUNT

Statement of Offence (a)

UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR: Contrary to Section 189 (1) of the Companies Act Cap 247.

Particulars of Offence (b)

ROHIT RAM LATCHAN, on the 28th day of October 2014, at Suva, in the Central Division, being declared a bankrupt by the Magistrate's Court in Suva and not having received his discharge, acted as a Director of, or directly or indirectly took part in the management of **LATCHAN HOLDINGS LIMITED**, without the leave of the Court by signing as the Director of **LATCHAN HOLDINGS LIMITED** on application for Caveat No. 804805.

SECOND COUNT

Statement of Offence (a)

UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR: Contrary to Section 189 (1) of the Companies Act Cap 247.

Particulars of Offence (b)

ROHIT RAM LATCHAN, on the 28th day of October 2014, at Suva, in the Central Division, being declared a bankrupt by the Magistrate's Court in Suva and not having received his discharge, acted as a Director of, or directly or indirectly took part in the management of **LATCHAN HOLDINGS LIMITED**, without the leave of the Court by signing as the Director of **LATCHAN HOLDINGS LIMITED** on application for Caveat No. 804806.

THIRD COUNT

Statement of Offence (a)

UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR: Contrary to Section 189 (1) of the Companies Act Cap 247.

Particulars of Offence (b)

ROHIT RAM LATCHAN, between the 4th January 2014 to 30th December 2015, at Suva, in the Central Division, being declared a bankrupt by the Magistrate's Court in Suva and not having received his discharge, acted as a Director of, or directly or indirectly took part in the management of **ESTOL HOLDINGS LIMITED** without the leave of the Court, by acting as the Director of **ESTOL HOLDINGS LIMITED**.

- [3] The Appellant pleaded not guilty to the charges and the matter proceeded to trial.
- [4] At the conclusion of the trial, on 23 December 2019, the Appellant was found guilty and convicted of the first and second counts. However, he was found not guilty and acquitted of the third count.
- [5] Thereafter, on 3 March 2020, sentence was passed on the Appellant. He was ordered to pay \$500/- as an aggregate fine in respect of both counts, with a default term of imprisonment of 50 days.
- [6] Aggrieved by the said Order the Appellant filed a Petition of Appeal in the High Court on 30 March 2020. The Petition of Appeal is in respect of both his conviction and sentence.
- [7] This matter was taken up for hearing on 13 October 2020. Counsel for both the Appellant and the Respondent were heard. Both parties filed Written Submissions, and referred to case authorities, which I have had the benefit of perusing. The Appellant also filed Supplementary Submissions, on the day of hearing, which I have had the benefit of perusing.
- [8] As per the Petition of Appeal the Grounds of Appeal taken up by the Appellant are as follows:

GROUND OF APPEAL

1. The Learned Trial Magistrate erred in law and in fact by entering a conviction against the Petitioner (Appellant) and failing to exercise his discretion under

Section 15 (1) (f) and Section 16 of the Sentencing and Penalties Act by failing to correctly consider,

- [a] Section 14 (2) (n) of the Constitution of Fiji allowed the Petitioner (Appellant) the benefit of the lower sentence if the sentence had changed during the period from when the alleged offence occurred and when the sentencing was done.
 - [b] The Companies Act 2015 provided that the Petitioner (Appellant) could be disqualified from acting as a director of a company if he had been an undischarged bankrupt pursuant to Section 133 (3) of the Companies Act 2015 and/or fined \$500 pursuant to Section 626 (c) (ii) of the Companies Act 2015.
 - [c] The principles laid down in *State v Batiratu* [2012] FJHC 864 (date of Judgment 13 February 2012).
 - [d] Other factors raised in the submissions on mitigation and sentencing filed on behalf of the Petitioner (Appellant) on 8 January 2020.
 - [e] The position of the State in relation to non-entry of a conviction against the Petitioner (Appellant).
2. The Learned Trial Magistrate erred in law and in fact in finding that the Petitioner (Appellant) was an undischarged bankrupt when Sumit Nand from the Office of the Official Receiver had given evidence that the Petitioner (Appellant) had been discharged and found that the prosecution had no burden to prove whether the bankruptcy order was discharged or not.
 3. The Learned Trial Magistrate erred in law and in fact in finding that the Petitioner (Appellant) took part in the management of Latchan Holdings Limited by signing as a director of that company in Caveat Number 804805 and 804806.
 4. The Learned Trial Magistrate erred in law and in fact in failing to consider that there was no evidence adduced by the State on the *mens rea* element of intention in the part of the Petitioner (Appellant) in relation to the offences.

5. The Learned Trial Magistrate erred in law and in fact when he did not accept the evidence of Sumit Nand that it was the duty of the Office of the Official Receiver to make an application for discharge of the bankruptcy order against the Petitioner (Appellant).

[9] As can be observed Ground 1 is a Ground of Appeal against the sentence; while Grounds 2-5 are Grounds of Appeal against the conviction.

The Law and Analysis

[10] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or

other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The Grounds of Appeal against Conviction

[12] As stated before Grounds 2-5 are Grounds of Appeal against the conviction. I find that Grounds 2, 3 and 5 of the Grounds of Appeal against the conviction are interconnected, as they are in relation to the evidence led during the trial. Thus I

deem it appropriate to discuss the aforesaid Grounds of Appeal against conviction together. Ground 4 would be discussed separately.

Grounds 2, 3 and 5

- [13] These Grounds of Appeal are that the Learned Trial Magistrate erred law and in fact in finding that the Appellant was an undischarged bankrupt when Sumit Nand from the Office of the Official Receiver had given evidence that the Appellant had been discharged and found that the prosecution had no burden to prove whether the bankruptcy order was discharged or not.
- [14] Further, that the Learned Trial Magistrate erred law and in fact in finding that the Appellant took part in the management of Latchan Holdings Limited by signing as a director of that company in Caveat Number 804805 and 804806.
- [15] And that the Learned Trial Magistrate erred in law and in fact when he did not accept the evidence of Sumit Nand that it was the duty of the Office of the Official Receiver to make an application for discharge of the bankruptcy order against the Appellant.
- [16] During the course of the trial in Magistrate's Court the prosecution relied on the evidence of the following witnesses:
1. Ms. Torika Goneca (Former Deputy Registrar of Titles) [Pages 259-265 of the Magistrate's Court Record].
 2. Mr. Sumit Nand (Executive Officer at the Official Receivers Office) [Pages 266-279 of the Magistrate's Court Record].
 3. Ms. Sangeeta Naidu (Investigating Officer) [Pages 279-298 of the Magistrate's Court Record].
 4. Mr. Shri Janardhan (Court Officer of the Magistrate's Court, Civil Registry) [Pages 299-305 of the Magistrate's Court Record].
 5. Mr. Abhi Ram (Former Acting Registrar of Companies) [Pages 244-253 of the Magistrate's Court Record].

- [17] At the end of the prosecution case, the Appellant made an Application that he has no case to answer. However, the Learned Trial Magistrate by his Ruling dated 28 June 2019, held that the Appellant has a case to answer.
- [18] The Appellant exercised his right to remain silent.
- [19] The Judgment of the Learned Trial Magistrate is found from pages 32-43 of the Magistrate's Court Record. The Learned Magistrate had duly considered and analyzed all the evidence lead at the trial.
- [20] The Learned Magistrate has stated that the prosecution relied on the evidence of Sumit Nand, Shri Janardhan and Detective Seargent Sangeeta Naidu to prove that Appellant had been declared bankrupt by the Magistrate Court. The order declaring the Appellant bankrupt was tendered to Court as Prosecution Exhibit PE4.
- [21] Sumit Nand, Executive Officer at the Official Receivers Office, testified that upon conducting a search, he had found that the Appellant had been declared bankrupt and that the order was still active (page 270 of the Magistrate's Court Record). When asked as to whether the bankruptcy order was discharged he said yes. However, when asked as to when the order was discharged, he said he cannot recall the date. He confirmed that between December 2013 to December 2015, the Appellant was still bankrupt (page 275 of the Magistrate's Court Record).
- [22] The Magistrate has further held that the prosecution has established that the Magistrate's Court had not issued any orders granting leave to the Appellant to act as a Director during the time material to the charges.
- [23] The Learned Magistrate has accepted that the Appellant had signed and lodged the two Caveats bearing numbers 804805 and 804806, which were tendered to Court as Prosecution Exhibits PE1 and PE2, as a Director of Latchan Holdings Limited (page 41 of the Magistrate's Court Record). I find that there is no error of fact or law in the Learned Magistrate coming to such a finding.
- [24] For the aforesaid reasons, I find that Grounds 2, 3 and 5 of the Grounds of Appeal against the conviction are without merit.

Ground 4

[25] This Ground of Appeal against Conviction is that the Learned Trial Magistrate erred in law and in fact in failing to consider that there was no evidence adduced by the State on the *mens rea* element of intention in the part of the Appellant in relation to the offences.

[26] The Appellant was charged in terms of Section 189 (1) of the Companies Act (Chapter 247 of the Laws of Fiji). The Section reads as follows:

189.-(1) If any person who has been declared bankrupt or insolvent by a competent court in Fiji or elsewhere and has not received his discharge acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company, except with the leave of the court, he shall be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding \$1,000, or to both.

(2) The leave of the court, for the purposes of this section, shall not be given, unless notice of intention to apply therefor has been served on the official receiver, and it shall be the duty of the official receiver, if he is of opinion that it is contrary to the public interest that any such application should be granted, to attend on the hearing of and oppose the granting of the application.

(3) In this section, "company" includes an unregistered company and a company incorporated outside Fiji which has an established place of business within Fiji, and "official receiver" means the official receiver in bankruptcy.

[27] In his Judgment [At pages 36-37 of the Magistrate's Court Record] the Learned Trial Magistrate has outlined the elements of the offence of an Undischarged Bankrupt Acting as a Director as follows:

- i. Any person,
- ii. who had been declared bankrupt or insolvent by a competent court in Fiji;
- iii. and has not received his discharge to act as a director;
- iv. Directly or indirectly takes part in or is concerned in the management of any company, and
- v. without the leave of the court.

[28] Chapter II of the Crimes Act No. 44 of 2009 (Crimes Act) sets out the General Principles of Criminal Responsibility. Section 10 of the Crimes Act provides:

"(1) The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of Fiji.

(2) This Chapter contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created."

[29] Section 11 of the Crimes Act states:

"11. — (1) This Chapter applies to all offences against this Decree.

(2) All courts in criminal proceedings or trials shall apply the provisions of this Decree in relation to offences under other laws to the fullest extent possible.

(3) Nothing in this Decree shall affect the validity of any proceeding taken in relation to any offence under any law that is not framed or expressed in accordance with the provisions of this Decree."

[30] Section 15 of the Crimes Act makes reference to the physical elements of an offence in the following manner:

"(1) A physical element of an offence may be —

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Decree—

"conduct" means an act, or an omission to perform an act or a state of affairs;

"engage in conduct" means —

(a) do an act; or

(b) omit to perform an act.

[31] Similarly, Section 18 of the Crimes Act makes reference to the fault elements of an offence in the following form:

"(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Sub-section (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence."

- [32] Section 23 of the Crimes Act makes provision for situations where an offence does not specify a fault element.

"23. — (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element."

- [33] In this case the physical element that the prosecution would be required to establish beyond reasonable doubt is that the Appellant directly or indirectly took part in or was concerned in the management of any company, without the leave of the Court.

- [34] Upon reading Section 189 (1) of the Companies Act, it is clear that the Section does not specify a fault element for the above physical element. It is also clear that the aforesaid physical element consists only of conduct. Therefore, in terms of the provisions of Section 23 of the Crimes Act, if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

- [35] I concede that in his Judgment, the Learned Trial Magistrate has made no reference to this element. However, when analyzing the entire body of evidence led on behalf of the prosecution it can be established that the Appellant's conduct clearly depicted intention on his part.

- [36] Furthermore, in passing the Sentence the Learned Magistrate has stated thus: "In fact, as transpired in evidence you signed both these caveats in the presence of your lawyers. Hence I am unable to accept that this is not a deliberate act."

- [37] Therefore, it is my opinion that this Ground of Appeal against conviction has no merit.

The Ground of Appeal against Sentence

[38] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*"...It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*Hause v. The King* [1936] HCA 40; [1936] 55 CLR 499)."*

[39] These principles were endorsed by the Fiji Supreme Court in *Naisua v. The State* [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in *Hause v. The King* [1936] HCA 40; [1936] 55 CLR 499; and adopted in *Kim Nam Bae v The State* Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration."*

[40] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (i) Acted upon a wrong principle;
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;
- (iv) Failed to take into account some relevant consideration.

[41] In *Sharma v. State* [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon

to review the sentence imposed by a lower court. The Court of Appeal held as follows:

"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (R -v- Lee Oosthuizen [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in Naikalekelevesi -v- The State (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in Qurai -v- The State (CAV 24 of 2014; 20 August 2015) at paragraph 48:

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ____."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the

Judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

[42] In this case the Appellant takes up the position that the Learned Trial Magistrate erred in law and in fact by entering a conviction against the Appellant and failing to exercise his discretion under Section 15 (1) (f) and Section 16 of the Sentencing and Penalties Act by failing to correctly consider,

- [a] Section 14 (2) (n) of the Constitution of Fiji allowed the Appellant the benefit of the lower sentence if the sentence had changed during the period from when the alleged offence occurred and when the sentencing was done.
- [b] The Companies Act 2015 provided that the Appellant could be disqualified from acting as a director of a company if he had been an undischarged bankrupt pursuant to Section 133 (3) of the Companies Act 2015 and/or fined \$500 pursuant to Section 626 (c) (ii) of the Companies Act 2015.
- [c] The principles laid down in *State v Batiratu* [2012] FJHC 864 (date of Judgment 13 February 2012).
- [d] Other factors raised in the submissions on mitigation and sentencing filed on behalf of the Appellant on 8 January 2020.
- [e] The position of the State in relation to non-entry of a conviction against the Appellant.

[43] The Appellant has made reference to Section 14 (2) (n) of the Constitution of Fiji. The Section reads:

"Every person charged with an offence has the right-

(a)

(b)

(c)

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing. "

[44] The Companies Act (Chapter 247 of the Laws of Fiji) has now been repealed by virtue of Section 752 (a) of the Companies Act No. 3 of 2015 (Companies Act 2015). The Companies Act of 2015 was enacted on 26 May 2015.

[45] Part 12 of the Companies Act 2015, is titled Disqualification from Acting as an Officer (Sections 132-134). Section 3 of the Act defines an "Officer" of a Company to mean:

(a) a Director or Secretary of the Company;

(b) a person—

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the Company;

(ii) who has the capacity to affect significantly the Company's financial standing; or

(iii) in accordance with whose instructions or wishes the Directors of the Company are accustomed to act, excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the Directors or the Company; or

(c) a Receiver or Manager, of the Property of the Company;

(d) a liquidator of the Company; or

(e) a trustee or other person administering a compromise or arrangement made between the Company and someone else.

[46] Section 132 (Disqualified Person not to Manage Companies) of the Act is re-produced below:

132. Any person who is disqualified from acting as an Officer of a Company under this Part commits an offence if they—

(a) consent to act as an Officer of a Company;

(b) make, or participate in making decisions that affect the whole, or a substantial part, of the business of the Company;

(c) exercise the capacity to affect significantly the Company's financial standing; or

(d) communicate instructions or wishes, other than advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the Directors or the Company to the Directors of the Company—

(i) knowing that the Directors are accustomed to act in accordance with the person's instructions or wishes; or

(ii) intending that the Directors will act in accordance with those instructions or wishes.

[47] Section 133 of the Companies Act provides that a person is disqualified from acting as an Officer of a Company in the following circumstances:

133.—(1) A person becomes disqualified from acting as an Officer of a Company if the person—

(a) is convicted of an offence that—

(i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of a Company;

(ii) concerns an act that has the capacity to affect significantly a Company's financial standing;

(iii) is a contravention of this Act, is punishable by imprisonment for a period greater than 12 months and is sentenced to a period of imprisonment greater than 12 months; or

(iv) involves fraud, dishonesty or breach of trust and is punishable by imprisonment for at least 3 months; or

(b) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months in Fiji if the offence was committed in Fiji.

(2)The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for—

(a) if the person does not serve a term of imprisonment – 2 years after the day on which they are convicted; or

(b) if the person serves a term of imprisonment – 2 years after the day on which they are released from prison.

(3) A person is disqualified from acting as an Officer of a Company if the person is an undischarged bankrupt under the laws of Fiji or another country for so long as the person is an undischarged bankrupt under the laws of Fiji or another country.

(4) A person is disqualified from acting as an Officer of a Company if the person is disqualified, either automatically, or under an order made by a court of a foreign country that is in force, from being—

(a) a Director of a Foreign Company; or

(b) concerned in the management of a Foreign Company.

(5)The Court may, on the application of the Registrar, extend the period of disqualification by up to an additional 15 years and in determining whether an extension is justified and if so, the period of disqualification, the Court may have regard to any matters that the Court considers appropriate.

[Emphasis is mine].

[48] During the Hearing before this Court the Counsel for the Appellant contended that presently there is no provision similar to Section 189 (1) of the former Companies Act and as such that the act complained of against the Appellant is no longer a criminal act. The Counsel further submitted that in terms of Section 133 (3) of the Companies Act of 2015 the only sanction available against a person violating the provisions of the said Section, was a disqualification of the person acting as an Officer of the Company. His contention therefore was that the offence has now been de-criminalized.

- [49] This is the same position that has been taken up by the Appellant in his Submission for Mitigation and Sentencing filed in the Magistrate's Court (pages 133-139 of the Magistrate's Court Record).
- [50] This Court cannot agree with this contention that the offence has been decriminalized. I agree that in the Companies Act of 2015, there is no offence titled "Undischarged Bankrupt Acting as a Director", which was Section 189 (1) of the former Companies Act. However, in terms of Section 133 (3) of the Companies Act of 2015, it is said that "*A person is disqualified from acting as an Officer of a Company if the person is an undischarged bankrupt under the laws of Fiji or another country for so long as the person is an undischarged bankrupt under the laws of Fiji or another country.*" As indicated earlier, an Officer has been defined to mean a Director or Secretary of the Company. This in the opinion of Court is the corresponding act to what existed as Section 189 (1) of the repealed Companies Act.
- [51] Section 133 (3) of the Companies Act of 2015 must be read together with Section 132, which provides that any person who is disqualified from acting as an Officer of a Company under the said Part commits an offence if that person does any of the acts as stated in the Section.
- [52] I concede that neither Section 132 nor Section 133 (3) have a penalty provision which is in-built in the Sections. However, the relevant penalty provision can be found in Section 626 of the Companies Act 2015, which outlines the General Penalty provisions in terms of the Act. Section 626 reads as follows:

626. A person who—

(a) does an act or thing that the person is forbidden to do by or under a provision of this Act;

(b) does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or

(c) otherwise contravenes a provision of this Act.

is guilty of an offence and—

(i) is liable to pay a Penalty not exceeding the Maximum Penalty prescribed for a contravention of that provision in accordance with this Act, unless a provision of this Act provides that the person is or is not guilty of an offence; or

(ii) if no Maximum Penalty is prescribed for a contravention of the provision in accordance with this Act, is liable to pay a Penalty not exceeding \$500, unless a provision of this Act provides that the person is or is not guilty of an offence.

- [53] Therefore, this Court cannot agree with this contention that there is no sentence provided for the acts stipulated under Section 133 (3) of the Companies Act of 2015. The relevant sentencing provisions have been clearly enumerated in Section 626 of the Act.
- [54] The Sentence of the Learned Trial Magistrate is found from pages 55-60 of the Magistrate's Court Record. Therein the Learned Trial Magistrate makes reference to the submission made by the Appellant that he is entitled to no punishment. The Learned Magistrate has rightly rejected this argument stating: "The submission that you are entitled to no punishment is clearly a misrepresentation and misrepresentation of constitutional provisions".
- [55] However, I agree with the contention of the Counsel for the Appellant that in terms of Section 14 (2) (n) of the Constitution the Appellant was entitled to the benefit of the least severe of the prescribed punishments where the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.
- [56] In terms of Section 189 (1) of the repealed Companies Act the prescribed punishment for the act was a term of imprisonment not exceeding 2 years or a fine not exceeding \$1,000, or both. In terms of Section 133 (3), read together with Section 132, of the Companies Act of 2015 the maximum penalty is a penalty not exceeding \$500.
- [57] In the instant case the Learned Trial Magistrate has gone on to impose a fine of a \$500 on the Appellant as an aggregate fine in respect of both counts 1 and 2. This fine clearly falls within the ambit of the penalty provisions stipulated in terms of Section 133 (3), read together with Section 132, of the Companies Act of 2015.

[58] The Appellant also contends that the Learned Trial Magistrate erred in law and in fact entering a conviction against the Appellant and failing to exercise his discretion under Section 15 (1) (f) and Section 16 of the Sentencing and Penalties Act.

[59] Section 15 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) stipulates the range of sentencing orders which a Court could impose. Section 15 (1) of the Act reads as follows:

15. — (1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this Decree —

(a) record a conviction and order that the offender serve a term of imprisonment;

(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;

(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;

(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;

(e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];

(f) with or without recording a conviction, order the offender to pay a fine;

(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(h) record a conviction and order the discharge of the offender;

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(j) without recording a conviction, order the dismissal of the charge; or

(k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.

[Emphasis is mine].

[60] Section 16 of the Sentencing and Penalties Act provides:

16. — (1) In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including —

(a) the nature of the offence;

(b) the character and past history of the offender; and

(c) the impact of a conviction on the offender’s economic or social well-being, and on his or her employment prospects.

[61] In *State v Batiratu* [2012] FJHC 864; HAR001.2012 (13 February 2012); His Lordship Chief Justice Anthony Gates held as follows:

“[29] The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether:

(a) The offender is morally blameless.

(b) Whether only a technical breach in the law has occurred.

(c) Whether the offence is of a trivial or minor nature.

(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.

(e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.

(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.”

[62] In this regard, the Learned Trial Magistrate has duly taken into account all the relevant considerations and has come to a finding that entering a non-conviction against the Appellant was not warranted (At pages 56-60 of the Magistrate’s Court Record). He has considered the case of *State v Batiratu* (Supra), and other relevant case authorities, in arriving at his finding.

[63] There is no justifiable basis for this Court to interfere with the Learned Trial Magistrate's conclusions.

[64] Considering the aforesaid, I am of the opinion that the Ground of Appeal against sentence is without merit.

Conclusion

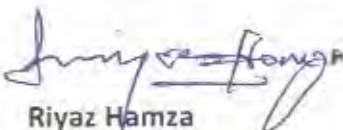
[65] Accordingly, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

[66] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Suva is affirmed.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

This 12th Day of February 2021

Solicitors for the Appellant : Parshotam Lawyers, Barristers & Solicitors, Suva.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.